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No. 90-1241

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

YMCA OF THE PIKES PEAK REGION, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence on the record as a whole supports the Board's finding that petitioner violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act by discharging an employee because she engaged in union and other protected activity and because she gave an affidavit and gathered information in support of another employee's case before the Board.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C1-C39) is reported at 914 F.2d 1442. The decision and order of the National Labor Relations Board (Pet. App. B1-B6, A1-A63) are reported at 291 N.L.R.B. No. 141.

JURISDICTION

The opinion of the court of appeals was filed on September 26, 1990. A petition for rehearing was denied on October 25, 1990. The petition for a writ of certiorari was filed on January 7, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioner, a nonprofit membership organization, operates two recreational centers in Colorado Springs, Colorado. Pet. App. A3-A7. In September 1985, Rita Ague was hired as a part-time employee on the aquatic staff at one of these centers. Early in October, Ague solicited employees to sign a document indicating an interest in organizing a union, and then contacted the Office and Professional Employees Union, Local No. 5 (the Union). Pet. App. A12.

On October 8, Ray Weber, the center's executive director, summoned Ague to his office, where he interrogated her about her union activity. Pet. App. C4, A12-A13, A14-A15. On October 14, Fawn Kirkland, Ague's direct supervisor, telephoned Ague to inform her that her hours had been cut because Ray Weber had identified her as a "troublemaker" and wanted to get rid of her. Ague told Kirkland that she intended to report the matter to the Union. Pet. App. A15. Shortly thereafter, the Union wrote petitioner a letter identifying Ague as a leader of its organizing effort. Pet. App. C4, A17. On December 19, the Union filed unfair labor practice charges alleging, *inter alia*, that petitioner had unlawfully interrogated and discriminated against Ague. The parties entered into a settlement agreement on February 14, 1986. Pet. App. A27-A28.

b. In late February, just before Ague left on a vacation, a number of employees signed union authorization cards in Ague's presence; one of those employees was Wes Beal. Pet. App. A29. When Ague returned from her vacation, she learned that petitioner had discharged Beal for allegedly sexually harassing Marnie Duke, a sixteen-year old who worked part-time as a lifeguard and swimming instructor. Pet. App. A32. Ague called Beal, who told her that he was surprised at having been discharged, and that

he had done "absolutely" nothing to Duke to warrant a complaint. Asked if he thought he had been discharged because of his union activity, Beal said that he might have aroused the hostility of executive director Klever by defending Ague at the employee meeting Klever called to discuss the Union's organizing effort. Ague asked whether Beal wanted her to pursue the matter and to inform the Union, and Beal responded affirmatively. Pet. App. A32-A33. Ague then contacted a Union representative and told her about Ague's conversation with Beal. Pet. App. A33. On March 12, the Union filed an unfair labor practice charge alleging that Beal's discharge was unlawful, Pet. App. A29, and Ague agreed to give an affidavit to the Board agent investigating the matter. Pet. App. A33.

Before she was scheduled to give her affidavit, Ague unsuccessfully attempted to discuss Beal's discharge with Diane Sanford, one of petitioner's supervisors. Pet. App. A33-A34. Ague then attempted to speak with Duke at work on March 18, the day before Ague was to give her affidavit. Pet. App. A34, A36. She was unable to do so and told Duke she would call her at home the following morning.

The next morning, Ague called Duke. Pet. App. A34. She started out by indicating that she was "all for women" and did not approve of sexual harassment, but that Beal did not know why he was fired. She then asked what Duke had said to Weber and Klever to get Beal fired. Pet. App. C8, A34, A37, A39. When Duke said that she did not know, Ague pressed the matter further, inquiring whether Beal had touched Duke or asked her to go to bed with him. Pet. App. C8, A34-A35, A38. Duke responded that she did not have time to talk because she had to leave for school. Pet. App. A36, A38-A39. Ague said that a man was coming from Denver to take her affidavit, that she was trying to find out if Beal was fired "for the right reasons" or because of his union activity, and that she had very little to go on. Pet.

App. C9, A34, A46. After the conversation, Duke's mother called Weber to complain that Ague had called and upset her daughter. Pet. App. A36-A38. That afternoon, Weber spoke to Duke, who told him that Ague had called in connection with her affidavit. Pet. App. A38-A39. Later that day, Ague gave an affidavit to a Board agent. Pet. App. A33.

The next morning, Weber and Sanford questioned Ague about her conversation with Duke. Ague verified that she had asked Duke certain questions, and explained that she had contacted Duke because she was concerned that Beal was discharged not for sexual harassment, but for union activity. Pet. App. C9, A39-A41. In accordance with the grievance procedure set forth in petitioner's published employee handbook, Ague asked to meet with Duke and Weber to discuss the matter further. Pet. App. A39-A40, A41 n.16, A50. Weber told Ague that he would consider the matter. Later that afternoon, Weber called Ague to his office and told her she was being discharged for "gross interference in a sexual harassment complaint." Pet. App. C9, A42-A43.

c. The Union then filed unfair labor practice charges regarding Ague's discharge. The Board's regional director set aside the earlier settlement agreement, and issued a complaint. Pet. App. A1-A2. The Board, in agreement with the administrative law judge, found that petitioner had violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), (3), and (4), by discharging Ague because she engaged in union and other protected, concerted activity and because she gave an affidavit to the Board and gathered information in support of Beal's case before the Board. Pet. App. A51, A52-A53, A57, B2-B3.[1]

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[1] The Board also found that petitioner violated Section 8(a)(1) of the Act by threatening Ague with a cut in her working hours and other

Relying upon its decisions in *Oakes Machine Corp.*, 288 N.L.R.B. 456 (1988), enforced in part and remanded on other grounds in part, Case No. 89-4052 (2d Cir. Mar. 23, 1990) and *Rockwell Int'l Corp.*, 278 N.L.R.B. 55 (1986), the Board found "that Ague's telephone call to Duke was concerted activity engaged in with or on the authority of other employees, and not solely by and on behalf of the employee herself." Pet. App. B2-B3, A46, A51. The Board further found that petitioner was aware of the "concerted nature of the call." Pet. App. A47.

The Board rejected petitioner's contention that, even if Ague's phone call to Duke constituted concerted activity, petitioner discharged her because Ague's conduct was "intermeddling," "offensive," "retaliat[ory]," and "a form of sexual harassment prohibited by Title VII which could be imputed to [petitioner]" if not renounced. Pet. App. B2, A47. The Board found that petitioner's asserted reason for discharging Ague was a pretext and that she would not have been discharged but for her union activities. Pet. App. A51. The Board noted that there was no evidence that Duke's work performance was affected by the call, or that any of her alleged physical symptoms were reported to petitioner's officials; that Executive Director Weber denied Ague's request for a meeting of all parties even though counseling was petitioner's usual first step in handling employee misconduct, and despite a grievance procedure that provides for such a meeting; and that Weber did not mention petitioner's obligations under Title VII as a reason for Ague's dismissal. Pet. App. A50-A51.

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reprisals because of her union activity and by coercively interrogating Ague about her union activity. The Board further found that petitioner violated Section 8(a)(3) and (1) of the Act by issuing a letter of reprimand to employee Bernadette O'Bryan because she engaged in union activity. Pet. App. A55, A56, A57. These findings were affirmed by the court of appeals (Pet. App. C24-C25) and are not challenged here.

The Board further found that, even if the offensive nature of Ague's questions and statements and the fear of Title VII liability motivated petitioner's decision to discharge Ague, that action was nonetheless unlawful because Ague's phone call was protected by Section 7 of the Act.[2] The Board acknowledged that "under certain circumstances, concerted activity for the mutual aid and protection of employees may lose the Act's protections." Pet. App. B3 (citing *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), and *NLRB* v. *Sands Mfg. Co.*, 306 U.S. 332 (1939)). Those circumstances include "public disparagement of an employer's product, a strike in breach of a collective-bargaining agreement, conduct that contravenes the basic policies of the Act, or violence." Pet. App. B3. The Board found that Ague's conduct did not fall within those categories, nor did it "amount to egregious misbehavior that should rob [her] effort to assist fellow employee Beal of its protected character." *Ibid.*; see also Pet. App. A49. Moreover, the Board found the Title VII cases relied upon by petitioner to be "inapposite" because in those cases, the employee was participating in conduct in violation of Title VII. Here, by contrast, the Board noted that "[a]lthough Ague was somewhat lacking in sensitivity, it is apparent that she was simply seeking information as to whether Beal's discharge might have been pretextual." Pet. App. A48-A49.[3]

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[2] Section 7 of the Act, 29 U.S.C. 157, provides, in relevant part, that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

[3] The Board held that petitioner had also violated Section 8(a)(4) of the Act, 29 U.S.C. 158(a)(4), which prohibits conduct that interferes with the Board's processes, because it found that Ague's discharge was motivated by her contacting Duke about Beal's discharge, and that peti-

2. The court of appeals, with one judge dissenting, enforced the Board's order. The court first rejected petitioner's argument (not renewed in its petition to this Court) that YMCA's impact on interstate commerce was insufficient for the Board to exercise its jurisdiction in this case. Pet. App. C10-C13.

On the merits, the court affirmed the Board's findings that petitioner's discharge of Ague violated Section 8(a)(1) and (3) of the Act. Applying the test from *Meyers Indus. (Meyers I)*, 268 N.L.R.B. 493 (1984), the court found that there was substantial evidence supporting the Board's conclusion that Ague's pursuit of an investigation into Beal's discharge was concerted activity and that petitioner was aware of its concerted nature. Pet. App. C17-C19.

The court rejected petitioner's argument that Ague's behavior was not "protected under the Act" because it violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. C19-C20. The court noted that "Ague was neither the employer nor acting on her employer's behalf," and that Ague was not "in a position of authority over Duke, nor was she threatening her with discharge." *Ibid.* The court also found that Ague's conduct had not "contributed to the hostile working environment envisioned by Title VII, since the regulations only prohibit 'verbal or physical conduct *of a sexual nature* . . . [which] has the purpose or effect of . . . creating an intimidating, hostile, or offensive working environment.'" *Ibid.* (quoting 29 C.F.R. 1604.11(a) (1989)).

The court also upheld the Board's finding that Ague's conduct was not sufficiently "indefensible" to remove it from the protection of Section 7. Pet. App. C20-C21. The court agreed with the Board that, while Ague's conduct was

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tioner knew Ague's purpose in contacting Duke was to obtain "information to give to a Board agent investigating the Beal discharge." Pet. App. A53.

"somewhat imprudent and lacking in sensitivity," Pet. App. C21 (internal quotation marks omitted), it was not unlawful, violent, in breach of contract, or otherwise indefensible – the categories of otherwise protected conduct that might lose their protected status under Section 7. Pet. App. C20, citing *Coors Container Co.* v. *NLRB*, 628 F.2d 1283, 1287 (10th Cir. 1980) (in turn citing *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9, 17 (1962)).

Finally, the court affirmed the Board's finding that petitioner's reliance on Ague's alleged harassment of Duke was pretextual – that petitioner had "seized upon this telephone conversation in order to rid itself of the leading union adherent." Pet. App. C17-C18 n.6, C21-C22.[4]

ARGUMENT

Petitioner argues (Pet. 14-45) that the court of appeals' decision – that petitioner violated the National Labor Relations Act – is "in conflict" with petitioner's obligations under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* This fact-bound challenge to the lower court's decision does not warrant review by this Court.

1. An employer violates Section 8(a)(3) of the Act by discharging an employee for engaging in union activity, and violates Section 8(a)(1) by discharging an employee for engaging in concerted activity for the employees' mutual aid

[4] Judge Baldock, in dissent, agreed that Ague's conduct "constituted concerted activity," but found that "the rude and insensitive manner in which Ague conducted her investigation placed her conduct outside the protection of Section 7." Pet. App. C25, C35. Judge Baldock also rejected the majority's alternative finding that petitioner's reliance upon the harassing nature of the phone call was purely pretextual. In his view, "[e]ven if [petitioner] entertained some anti-union animus when it discharged Ague, the record shows that a well-grounded fear of Title VII exposure constituted an independent and legitimate basis for her discharge." Pet. App. C36.

or protection. *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 394, 397-398, 401-402 (1983). An employer violates Section 8(a)(4) of the Act by discharging an employee for "participation in the important developmental stages [of a Board proceeding] that fall between" the filing of a charge and an appearance at a hearing. *NLRB* v. *Scrivener*, 405 U.S. 117, 121-125 (1972). Once the General Counsel has made a prima facie case that an employee's protected conduct "was a substantial or motivating factor in the discharge," the employer will be found to have violated the Act unless it can prove that the discharge "would have occurred in any event and for valid reasons." *Transportation Management Corp.*, 462 U.S at 400.

In this case, as the court below found, the General Counsel made a prima facie case by showing that petitioner was aware of Ague's leadership in the Union's organizing efforts (Pet. App. C19 n.8); and that petitioner was hostile to these efforts (Pet. App. C17 n.6). Although petitioner contends that it had a legitimate, nondiscriminatory reason for its discharge of Ague—that Ague's telephone call to Duke constituted sexual harassment or other indefensible misconduct—the Administrative Law Judge (Pet. App. A51), the Board (Pet. App. B1-B2), and the court below (Pet. App. C17-C18 n.6) all found that petitioner did not, in fact, discharge Ague for making the telephone call to Duke, but rather "seized upon this telephone conversation in order to rid itself of the leading union adherent." Pet. App. C22 (quoting Pet. App. A51).

The record fully supports this finding. Petitioner made no mention of its obligations under Title VII when it discharged Ague. Pet. App. A50. Petitioner discharged Ague without considering any steps short of discharge, despite a policy ordinarily requiring use of counseling prior to discharge, even for serious offenses. *Ibid.* Petitioner also rejected Ague's request for a meeting attended by all

parties involved in the dispute, despite a written policy providing for such grievance meetings. *Ibid.* Petitioner did so although such a meeting would have afforded it an opportunity to distance itself from Ague's conduct and to determine if it would be repeated, matters petitioner now asserts (Pet. 33-43) were of prime concern in its decision to discharge Ague. The Board (Pet. App. A51) and the court below (Pet. App. C17-C18 n.6, C21-C22) thus correctly found that the disproportionate severity of the discipline, and the summary manner in which was imposed, belied petitioner's claim that the discharge was brought about by the phone call.[5]

2. Petitioner now concedes (Pet. 24-25) that Ague's phone call was concerted activity for "mutual aid or

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[5] The fact that petitioner surely could not be held liable under Title VII for Ague's behavior underscores the Board's finding that petitioner's asserted concern for Duke was pretextual. Ague was not Duke's supervisor and did not have any authority over Duke. Indeed, Ague's purpose in calling Duke went against petitioner's interest in stopping its employees from unionizing. Ague's single phone call also plainly did not create a sexually hostile work environment. Pet. App. C20. It was neither threatening nor sexual in nature, and had a legitimate investigative purpose. Nor was it so "severe or pervasive [as] to alter the conditions of [the victim's] employment and create an abusive working environment." *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57, 67 (1986). The cases cited by petitioner (Pet. 30-32) are not to the contrary. See *Meritor Savings Bank* v. *Vinson*, *supra* (over the course of several years, the plaintiff's supervisor fondled and touched the plaintiff and other female employees, demanded sexual intercourse, followed plaintiff into the women's room, and exposed himself to her); *Baker* v. *Weyerhaeuser Co.*, 903 F.2d 1342, 1345 (10th Cir. 1990) (senior employee, with history of sexual harassment complaints against him, who occasionally gave plaintiff "operational orders," made repeated explicit sexual advances and, when his efforts were rebuffed, gave plaintiff "'extra' work"); *Hunter* v. *Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417, 1421 (7th Cir. 1986) (employee subjected to a prolonged campaign of harassment because of his race).

protection" within the meaning of Section 7 of the Act, and that petitioner was aware of the purpose of Ague's call. Petitioner argues, however, (Pet. 22-45) that the "rude and insensitive" manner in which Ague acted toward Duke over the phone stripped her conduct of protection under Section 7.

Conduct otherwise protected by Section 7 does not lose that protection unless it is unlawful, violent, in breach of contract, or an "indefensible" reflection of disloyalty "unnecessary to carry on the workers' legitimate concerted activities." *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9, 17 (1962); *NLRB* v. *Empire Gas, Inc.*, 566 F.2d 681, 684-687 (10th Cir. 1977). For reasons given above (note 5, *supra*), Ague's conduct did not violate Title VII. Nor did it fall into any of the other categories of egregious misbehavior that would strip that conduct of its protected character. Ague used no abusive language, and did not threaten Duke with physical or other harm. And although Ague's call may have been "somewhat lacking in sensitivity" (Pet. App. A49), it was apparent that she was simply seeking to ascertain whether Beal's discharge was union-related.[6] The Board and the court below thus reasonably

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[6] The decision of the Tenth Circuit in this case does not, as petitioner contends (Pet. 25), conflict with that court's own prior decisions in *Timpte, Inc.* v. *NLRB*, 590 F.2d 871 (1979), and *Montgomery Ward & Co.* v. *NLRB*, 374 F.2d 606 (1967). (Nor, in any event, would any such intra-circuit conflict warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).) In *Timpte*, the court emphasized that the employee's conduct was a deliberate refusal to stop using filthy language in union campaign material after being requested to do so. 590 F.2d at 873-874. In *Montgomery Ward*, the employee called a customer of the store a bastard and a son-of-a-bitch. 374 F.2d at 611 n.4. Here, by contrast, Ague used no abusive or obscene language, Ague's phone call was a single, isolated incident, and Ague's conduct was in direct response to a discharge she suspected might be unlawful and retaliatory. Pet. App. C21 n.9.

concluded that Ague's conduct was not such as to deprive it of the protection of Section 7.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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